



**DEPARTMENT OF TRANSPORTATION**

**[4910-22-P]**

**Federal Highway Administration**

**[Docket No. FHWA-2016-0035]**

**Proposed Amendment to the Third Renewed Memorandum of Understanding (MOU) Assigning Certain Federal Environmental Responsibilities to the State of California, Including National Environmental Policy Act (NEPA) Authority for Certain Categorical Exclusions (CEs)**

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice of proposed amendment, request for comments.

**SUMMARY:** The FHWA and the State of California acting by and through its Department of Transportation (Caltrans), propose an amendment to the Memorandum of Understanding (MOU) authorizing the State's participation in the 23 U.S.C. 326 program. This program allows FHWA to assign to States its authority and responsibility for determining whether certain designated activities within the geographic boundaries of the State are categorically excluded from preparation of an Environmental Assessment or an Environmental Impact Statement under the National Environmental Policy Act. The parties propose to amend the MOU to make the litigation provisions consistent with the 23 U.S.C. 327 program MOU and to allow a 90 day suspension of the program, giving the State an opportunity to renew its waiver of sovereign immunity and acceptance of Federal court jurisdiction. The program will resume upon the State's recertification that the sovereign immunity waiver and acceptance of Federal court jurisdiction is in place.

**DATES:** Comments must be received on or before **[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** You may submit comments by any of the methods described below. To ensure that you do not duplicate your submissions, please submit them by only one of the means below. Electronic or facsimile comments are preferred because Federal offices experience intermittent mail delays due to security screening.

*Federal eRulemaking Portal:* Go to Web Site: <http://www.regulations.gov/>. Follow the instructions for submitting comments on the DOT electronic docket site (FHWA-2016-0035).

*Facsimile (Fax):* 1-202-493-2251.

*Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590.

*Hand Delivery:* 1200 New Jersey Avenue, SE., Washington, DC 20590 between 9 a.m. and 5 p.m., Eastern Time, Monday through Friday, except Federal holidays.

For access to the docket to view a complete copy of the proposed MOU, or to read background documents or comments received, go to <http://www.regulations.gov/> at any time or to 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Eastern Time, Monday through Friday, except for Federal holidays.

**Instructions:** You must include the agency name and docket number at the beginning of your comments. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:** For FHWA: Shawn Oliver; by email at [shawn.oliver@dot.gov](mailto:shawn.oliver@dot.gov) or by telephone at 916-498-5048. The FHWA California Division Office's normal business hours are 8 a.m. to 4:30 p.m. (Pacific Time), Monday-

Friday, except for Federal holidays. For the State of California: Tammy Massengale; by email at [tammy.massengale@dot.ca.gov](mailto:tammy.massengale@dot.ca.gov) or by telephone at 916-653-5157. State business hours are the same as above although State holidays may not completely coincide with Federal holidays.

## **SUPPLEMENTARY INFORMATION:**

### **Electronic Access**

Internet users may reach the Office of the Federal Register's home page at: <http://www.archives.gov/> and the Government Printing Office's database: <http://www.fdsys.gov/>. An electronic version of the proposed MOU may be downloaded by accessing the DOT DMS docket, as described above, at <http://www.regulations.gov/>.

### **Background**

Section 326 of Title 23 U.S. Code, creates a program that allows the Secretary of the U.S. Department of Transportation (Secretary) to assign, and a State to assume, responsibility for determining whether certain Federal highway projects are included within classes of action that are categorically excluded (CE) from requirements for Environmental Assessments or Environmental Impact Statements pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 et seq. In addition, this program allows the assignment of other environmental review requirements applicable to Federal highway projects, except with respect to government-to-government consultations with federally recognized Indian tribes (23 U.S.C. 326(b)(1)). The FHWA retains responsibility for conducting formal government-to-government consultation with federally recognized Indian tribes, which is required under some of the above-listed laws

and Executive Orders. The State may assist FHWA with formal consultations, with consent of a tribe, but FHWA remains responsible for the consultation. The Secretary delegated his authority to FHWA, which acts on behalf of the Secretary with respect to these matters.

The FHWA renewed California's participation in this program for a third time on May 31, 2016. The original MOU became effective on June 7, 2007, for an initial term of three (3) years. The first renewal followed on June 7, 2010, and the second renewal followed on June 7, 2013. The third MOU renewal has an expiration date on May 31, 2019.

The FHWA and Caltrans propose three modifications to the MOU. First, the parties propose to modify Stipulations IV.G.5 and IV.G.9 with regards to coordination on settlements and appeals to make them consistent with the draft MOU for participation in the 23 U.S.C. 327 Surface Transportation Project Delivery Program. The draft MOU for that Program can be accessed in Docket No. FHWA-2016-0019.

Second, Stipulation V.B. of the MOU contains a termination clause stating that the State's authority to participate in the program will end on January 1, 2017, unless the California Legislature takes affirmative action to extend the sovereign immunity waiver under the Eleventh Amendment of the U.S. Constitution. The parties propose an amendment that establishes a process to address a possible temporary lapse in the State's statutory consent to Federal jurisdiction and waiver of sovereign immunity. If the State does not provide consent to Federal court jurisdiction and waive sovereign immunity by December 31, 2016, this MOU will be suspended and Caltrans will not be able to make

any NEPA decisions or implement any of the environmental review responsibilities assigned under the MOU. The FHWA and Caltrans propose a temporary suspension not to exceed 90 days to provide time for the State to address the deficiency. In the event that the State does not take the necessary action and Caltrans does not provide adequate certification within the time period provided, the State's participation in the Program will be terminated. This language is the same as the one proposed in the draft MOU for the Surface Transportation Project Delivery Program (Docket No. FHWA-2016-0019).

Third, the parties propose an amendment to Stipulation language to eliminate unnecessary paperwork. The current MOU requires a Federal Register notice that announces the agency's decision and execution of the MOU. The parties believe that requiring publication in the Federal Register of the decision is unnecessary. Publication of the final MOU through other means, such as in the State's public website, would be a more effective means of disseminating the outcome of this process.

The FHWA will consider the comments submitted on the proposed MOU when making its decision on whether to execute this renewal MOU. The FHWA will make the final, executed MOU publicly available.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 326; 42 U.S.C. 4331, 4332; 23 CFR 771.117; 49 CFR 1.85; 40 CFR 1507.3, 1508.4.

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Federal Highway Administration

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